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No. 99-1361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of New York

REPLY TO BRIEFS OF RESPONDENTS AND *AMICI CURIAE*

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PRELIMINARY STATEMENT

> Good name in man and woman...is the immediate jewel of their souls: Who steals my purse steals trash...But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.[1]

Petitioner Elizabeth Caprotti submits this reply in response to the respondents' brief in opposition, and to the brief of the *amici curiae*.[2]

This case raises important questions of federalism and pre-emption of State common-law defamation claims. It provides an opportunity to clarify the law governing so-called "PEG" (public, educational and governmental) channels on cable television. This Court does not appear to have addressed the subject since *Denver Area*[3] in 1996 (Petition, Point IV at 23-4, and 28 n. 16).

The brief of the *amici*, arguing that certiorari should be denied, on the contrary powerfully demonstrates the significance of this case. The *amici* show that defamation on public access cable television is an ongoing issue, that it affects many more persons than this one petitioner, and that municipalities face serious liability for defamation on the public access stations

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[1] *Othello*, Act III, Scene iii.

[2] On April 14, 2000, the *amici* filed a motion for leave to file this brief erroneously stating (at 1), due to a misunderstanding between counsel, that petitioner had refused to consent. The previous day, petitioner's counsel had submitted a letter of consent to the Court.

[3] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). The *amici* erroneously state that PEG channels are a public forum (Br. at 8), a conclusion that the *Denver Area* plurality specifically refused to reach . See Petition at 28 n. 16.

which they operate. Their responsibilities and the rights of the viewing public should be clarified.

The respondents and the *amici* argue that municipal franchising authorities should have absolute unqualified immunity from all common-law tort liability arising from the speech of a public access programmer to whom they have given a forum. They argue this despite that they alone decide who can broadcast and that they alone can restrain or remove programmers who violate their rules against defamation. They are already immune from claims by programmers who have been removed[4]; now they seek blanket immunity from claims by the general public as well.

Respondents' "sweeping interpretation of the statute would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the...[petitioner's] injuries." *Medtronic, Inc. v Lohr*, 518 U.S. 470, 488 (1996)(footnote omitted).

This is not an issue of censorship, as the *amici* claim (Br. at 2), but of the simple tort law obligation to use reasonable care when there is a duty. Defamation is unprotected by the First Amendment and stopping it is not censorship. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1939).

When a private person is defamed in print or on radio or commercial television (outside the context of matters of public importance), no First Amendment issue arises.[5] Moreover, the

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[4] *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395 (8th Cir.1997), Petition at 26-8.

[5] Broadcasters are strictly liable for defamation uttered on their stations, even absent prior notice. *Hartmann v. Winchell*, 296 N.Y. 296 (1947); *Coffey v. Midland Broadcasting Co.*, 8 F.Supp. 889 (continued...)

spectrum scarcity issue, which applies to broadcast media and limits the reach of the First Amendment, does not apply to cable television.[6] In effect, respondents demand an unqualified "public access privilege" against defamation. There is no such privilege and there is no reason to create one.

POINT I

THERE ARE NO ISSUES OF FACT; RESPONDENTS MISSTATE THE RECORD.

Respondents say that they "have not conceded that Rybacki's statements were defamatory per se or whether, if substantiated, respondents are jointly liable with Rybacki for defamation or negligence [or] that they were 'publishers' of the alleged defamatory statements under New York common law, and would otherwise be jointly liable to petitioner." Br. at 2.

The record demonstrates otherwise. In their summary judgment motion and appellate briefs, their only argument was that 47 U.S.C. § 555a was a complete defense. Were there any factual issues, summary judgment would have been denied. The Court of Appeals majority said that there were no issues of fact:

> [Petitioner] alleges that [Rybacki] used his program to wage a vicious campaign of harassment against her by repeatedly defaming her and her three sons...on television. Plaintiffs assert that despite their complaints to members of the municipality's Town Board and WPAC, the municipality refused to stop Rybacki's defamatory

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[5](...continued)
(W.D.Mo.1934); Annot., *Defamation by Radio or Television*, 50 A.L.R.3d 1311 (1973).

[6] *Denver Area, supra*, n. 2, 518 U.S. at 748.

broadcasts, and thereby willfully failed to comply with the Regulations. *The nature of these allegations is not in dispute...*[and] *we are mindful of the undisputed nature of Rybacki's broadcasts.* (2a, 5a)(emphasis added).

In his dissenting opinion, Judge Levine said:

[Respondents] *do not contest the allegations of the complaint* that...Ronald Rybacki... regularly and repeatedly defamed and vilified in obscene terms plaintiffs Elizabeth Caprotti and her three sons... *Defendants do not dispute* that Caprotti repeatedly complained to them about Rybacki's attacks and remonstrated with them to take him off the air. *Nor is it disputed* that defendant had the legal power...to withhold Rybacki's use of the public access channel for his constitutionally unprotected expressions... Nevertheless, *defendants concede that they declined to take Rybacki off the public access channel or otherwise control his defamatory communications...Defendants do not contest that*, by knowingly enabling Rybacki to spread his defamatory lies over the Town's public access cable channel, *they facilitated Rybacki's publication of the libels and, therefore, are joint tortfeasors under New York common-law principles of defamation.* (7a-8a)(emphases added).

Thus, this case presents purely legal questions.[7]

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[7] Analogously, Internet service providers are "publishers" of defamatory statements which they fail to remove from computerized bulletin boards. *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir.1997), *cert.den.*, ___U.S.___, 118 S.Ct. 2341 (1998). In *Zeran*, 47 U.S.C. § 230 was held to be a complete defense to a defamation claim. The question here is whether 47 U.S.C. § 555a(a) (continued...)

POINT II

"REGULATION OF CABLE SERVICE" IS AMBIGUOUS IN THE PRESENT CONTEXT.

Respondents and the *amici* argue that the phrase "regulation of cable service" is "clear and unambiguous" and that "an ambiguity in the statutory language does not exist." Resp. Br. at 6 and 8; see *Amici* Br. at 3 and 6. But statutory language can be clear in one context and unclear in another.

In *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir.1996)(Petition at 24-25), the Court said that the phrase was not unconstitutionally vague in the context of a claim brought by a cable operator. 80 F.3d at 324 n. 3. However, this does not require the same conclusion in the context of a claim brought by a private citizen.

The distinction is drawn in *Medtronic, supra* (Petition at 18-20). The statute there barred States from establishing "any requirement" regarding medical devices, and the issue was whether a common-law tort claim was a "requirement." This Court said that even if the statute were construed as an express pre-emption, so that "we need not go beyond that language to determine whether Congress intended...to pre-empt at least some state law,...we must nonetheless identify the domain expressly pre-empted by that language." 518 U.S. at 484 (citation and quotation marks omitted).

There is no basis to extend the statute to an entirely different domain, and thereby pre-empt petitioner's claims. "[I]f Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it." 518 U.S. at

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[7](...continued)
should be similarly construed, despite vastly different language, Congressional intent and public policy. *Cf. Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242 (1999), *pet. for cert. filed*, No. 99-1430.

487. "Requirement" did not pre-empt the tort claims in *Medtronic*; "regulation" does not do so here.

The word "regulation" also has different meanings depending upon the context. *Compare Cipollone*[8] ("the term 'regulation' most naturally refers to positive enactments by [legislatures], not to common-law damages actions") with *Silkwood*[9] and *Medtronic, supra*, 518 U.S. at 488-91 (tort remedies have only indirect regulatory effect).

Respondents and the *amici* argue that the phrase "regulation of cable service" should be broadly interpreted. But the presumption goes the other way; pre-emption is always narrowly construed. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court held that appointed state judges were not "employees" within the meaning of the Age Discrimination in Employment Act. "We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467 (citation omitted; emphasis in original).

"Thus, it is [respondents'] burden to show that Congress intended to preclude such [damage] awards" (*Silkwood, supra*, 464 U.S. at 255), and their burden to show that "regulation of cable service" was intended to include private defamation claims. They have not done so.

Respondents also misstate the meaning of the savings clause, 47 U.S.C. § 556. The *amici* say that "Congress could have chosen to preserve petitioner's state common law claim against respondent in the savings clause 47 USC § 556 – but it did not." (Br. at 4). However, the essence of federalism–under the

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[8] *Cipollone v. Liggett Group*, 505 U.S. 504, 519 (1992)(Petition at 18-19)

[9] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)(Petition at 20).

Supremacy Clause and the Tenth Amendment–is that State common-law claims are *never* pre-empted, unless and until Congress says otherwise. This is the plain meaning of § 556(a), which says that local authority over "matters of public health, safety and welfare" is preserved. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)(savings clauses of the Clean Water Act permitted New York common-law damage action for water pollution which occurred in Vermont). Thus the savings clause preserves petitioner's claims in State court.

POINT III

IMPLIED FIELD AND CONFLICT PRE-EMPTION ANALYSES ARE REQUIRED, EVEN IF THERE IS EXPRESS PRE-EMPTION.

Citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), respondents argue that because petitioner's claims are expressly pre-empted, there can be no implied field or conflict pre-emption analysis (Br. at 9). This is incorrect. In *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)(Petition at 18-19), this Court said, "[a]ccording to respondents and the Court of Appeals, [*Cipollone*] held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. This argument is without merit." 514 U.S. at 287. "Petitioner's pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law...A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS [anti-lock braking system] devices, since none exist." 514 U.S. at 289-90.

There are "no federal objectives or purposes" with respect to State common-law defamation claims brought by private persons, and there is no federal interest in pre-empting them,

absent countervailing First Amendment considerations.[10] Thus, even if respondents' broad interpretation of "regulation of cable service" were correct, they would still lose on an implied field or conflict pre-emption analysis. Petition, Point III at 21.

POINT IV

INJUNCTIVE AND DECLARATORY RELIEF ARE UNAVAILABLE REMEDIES.

Respondents and the *amici* argue that petitioner has remedies despite pre-emption of her damage claims, because § 555a(a) does not bar an injunction or a declaratory judgment. However, neither of these remedies is available.

It is well established that a court of equity does not generally have the power to enjoin defamation, because prior restraint on speech violates the First Amendment, and because there is an adequate remedy at law, *viz.* damages. *Alberti v. Cruise*, 383 F.2d 268 (4th Cir.1967); *Wolf v. Gold*, 193 N.Y.S.2d 36, 9 App.Div.2d 257 (1st Dept.1959).

Declaratory relief is meaningless, because it is undisputed that petitioner has been defamed. There is nothing for a court to declare because the issue is not controverted. Damages are the appropriate remedy for defamation, and they are historically the only remedy. Petition, Point I, at 14-18.

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[10] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); Petition, Point I at 14-17.

POINT V

THE EQUAL PROTECTION ARGUMENT WAS RAISED BELOW AND HAS NOT BEEN WAIVED.

Respondents claim that the issue of equal protection was waived because it was not raised below (Br. at 15). This is incorrect. Petitioner's brief in the Court of Appeals said:

> From the perspective of a libel plaintiff, there is no basis for treating a cable television station differently from a broadcast station, and there is no basis for treating a cable television station operated by a municipality differently from one operated by a private company. Any such rule would dictate a different result for a libel plaintiff depending solely upon the form of ownership and control. This would raise serious constitutional questions of due process and equal protection of the laws. Pet. Br. at 20.

Thus, the equal protection argument is preserved in this Court. Even if the argument had not been raised below, this Court can still address it. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991)("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.")

On the merits, respondents and the *amici* misstate the equal protection issue. The appropriate test is a rational basis, rather than strict scrutiny, inasmuch as the classification is not an inherently suspect one. The interpretation of the Court of Appeals majority creates a distinction based solely upon the form of ownership and control of a public access cable television

station. That distinction may have a rational basis with respect to suits by cable system operators over franchise awards; the purpose of § 555a to protect municipalities from such suits makes that much clear. However, a private defamation plaintiff's right to recover can not rationally depend upon the form of ownership and control of the station. There is no such distinction with respect to any other media, and no rational reason for one here.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Dated: New York, New York
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